A

ML BREADWORKS SDN BHD

v.

MALAYAN BANKING BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
NALLINI PATHMANATHAN J
[WRIT OF SUMMONS NO: D-22NCC-1003-2011]
13 AUGUST 2012

C ***BANKING:*** *Banker and customer - Forgery - Customer asserting cheque honoured by defendant bank forged - Burden to prove signatures on cheques forged on the customer on a balance of probabilities*

D ***BANKING:*** *Banker and customer - Forgery - Liability of bank to compensate when honouring forged cheque - Common law exceptions - Statutory estoppel in favour of bank under s. 24 of Bills of Exchange Act 1949 - Nature of - Defence in favour of bank under s. 73A of Bills of Exchange Act 1949 - Scope and effect*

E ***BANKING:*** *Cheque - Forged cheques - Customer asserting cheque honoured by defendant bank forged - Burden to prove signatures on cheques forged on the customer on a balance of probabilities*

F ***BANKING:*** *Cheque - Forged cheques - Liability of bank to compensate when honouring forged cheque - Common law exceptions - Statutory estoppel in favour of bank under s. 24 of Bills of Exchange Act 1949 - Nature of - Defence in favour of bank under s. 73A of Bills of Exchange Act 1949 - Scope and effect*

G ***BANKING:*** *Deposit accounts - Current account - Terms and conditions - Conclusive evidence clause in Terms and Conditions governing customer's account - Banker negligent or failing to exercise sufficient or adequate care - Whether banker ought to be allowed to rely on clause*

H ***BANKING:*** *Deposit accounts - Current account - Terms and conditions - Exclusion/limitation of liability clauses in Terms and Conditions governing customer's account - Exclusion/limitation of liability clauses excluding banker's liability in event of unauthorised debiting of customer's account - Whether banker could rely on clauses*

I

EVIDENCE: *Burden of proof - Forgery - Plaintiff asserting cheque honoured by defendant bank forged - Burden to prove signatures on cheques forged on plaintiff on a balance of probabilities* A

EVIDENCE: *Expert evidence - Handwriting - Evidence of handwriting experts opinion evidence - Nature of expert opinion evidence - How courts ought to treat such evidence* B

The plaintiff in the instant case sought to recover monies debited from its account with the defendant bank, in respect of one of its cheques ('the disputed cheque') made out to one Kashifah Trading, which the plaintiff claimed was forged but which the defendant honoured. The plaintiff sought a declaration that the defendant had wrongfully debited its Current Account and premised its claim in negligence and breach of contract. C

Held (allowing the plaintiff's claim): D

(1) The question of whether the disputed cheque was forged or unauthorised is a question of fact to be determined by the court. The burden was on the plaintiff to prove on a balance of probabilities, that the signatures on the cheque were forged or unauthorised. Based on the facts, it was clear that the signature on the disputed cheque was indeed forged or unauthorised. (paras 20-25) E

(2) The evidence of handwriting experts is ultimately opinion evidence that has to be treated with caution. It is only one piece of evidence which has to be construed within the context of the factual matrix of any particular case in determining its efficacy. It cannot take the place of substantive evidence. The court will have to consider whether such expert opinion evidence is corroborated either by direct evidence or circumstantial evidence. In the instant case, the direct evidence available in relation to the cheque inclined towards it being a forgery or unauthorised cheque. (para 27) F G H

(3) Having perused and considered the evidence of the two experts, their reports, their evidence during the trial as well as submissions of counsel for the plaintiff, the opinion of the plaintiff's expert was preferred over the defendant's expert for several reasons. It was thus concluded that the signatures I

on the disputed cheque were forged or unauthorised. The plaintiff had therefore succeeded in establishing on a balance of probability that the signatures on the disputed cheque were forged or unauthorised. (paras 28-37)

(4) It is incumbent upon a bank to compensate or reimburse its customer if it makes payment on a forged instrument. *Prima facie*, upon proof of a cheque having been forged, the liability of the bank arises without question as an absolute liability, unless the customer's relatively narrow duties of failing to exercise due care in the drawing of a cheque or failing to alert the bank of known forgery were to be proved, in which event the bank might avoid liability. If an express or implied representation were made by the customer to the effect that the cheque ought to be honoured then this might amount to an estoppel availing the bank of a defence and precluding the customer from recovering the quantum paid out erroneously by the bank. In this context, mere silence or an omission to act cannot amount to such an estoppel. Such is the position at common law. *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd.* (foll); *United Asian Bank Bhd. v. Tai Soon Heng Construction Sdn. Bhd.* (foll). (paras 40-47)

(5) The common law has been codified in s. 24 of the Bills of Exchange Act 1949, which creates a limited exception in favour of a banker. Section 24 protects a banker by recourse to the doctrine of estoppel. A customer cannot recover if he has represented to his banker that the forged signature is effective and the instrument is accordingly good for payment. *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd* (refd); *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd* (foll); *Marfani & Co Ltd v. Midland Bank Ltd* (refd); *Brown Westminster Bank Ltd* (refd); *Tina Motors Pty Ltd v. Australia & New Zealand Banking Group Ltd* (refd); *National Bank of New Zealand Ltd v. Walpole and Patterson Ltd* (refd); *National Australia Bank Ltd v. Hokit Pty Ltd* (refd). (paras 48-50)

(6) Section 73A of the Bills of Exchange Act 1949 statutorily alters or amends the common law position, to the extent that it provides a complete defence to any claim for monies from the paying institution or bank under a forged instrument where that same customer, knowing that the instrument was forged, contributed to it, or negligently

allowed the forgery to be perpetrated. Section 73A provides a clear and complete defence if the bank can prove that the customer was complicit or negligent in facilitating the forgery. The burden however, is on the bank to prove such complicity or negligence. *Globelink Container Line (M) Sdn Bhd v. Bumiputra Commerce Bank Berhad* (refd); *Melewar Apex Sdn Bhd v. Malayan Banking Bhd* (refd). (paras 52-55)

(7) The common law establishes the strict liability of a bank to make good any payment out on a forged instrument on the basis that there was never any mandate from the customer to warrant good discharge of the same. Section 24 of the Bills of Exchange Act 1949 allows the bank to disclaim liability where it could establish an estoppel on the part of the customer, which amounted to a representation that the forged instrument was good for payment. Section 73A of the Bills of Exchange Act 1949 then provides two further specific instances in which the banks could also seek refuge. The statutory effect of the latter part of the first limb of s. 24 and s. 73A is to carve out specific instances when the liability of the bank on a forged instrument is not absolute. (para 56)

(8) In the instant case, the (disputed) cheque was forged. The onus was on the defendant to establish that the forged signature of the Accountant was good and ought to be honoured. However, there was no evidence led by the defendant to establish such an estoppel. On the facts, that there was no representation made by the plaintiff warranting the existence or creation of an estoppel as envisaged under s. 24 of the Bills of Exchange Act 1949 which precluded the plaintiff from recovering the monies erroneously or wrongfully paid out by the defendant. (paras 57-65)

(9) The defendant had not been able to establish that the plaintiff 'knowingly or negligently contributed to the forgery or making of the unauthorised signature'. There was simply insufficient evidence to establish negligence, and far less, 'knowing' assistance. The defendant had failed to satisfy s. 73A of the Bills of Exchange Act 1949. (paras 66-84)

(10) There was no evidence before the court that it was made clear to the plaintiff that in the event of an unauthorised debiting of the plaintiff's account arising from forgery or an unauthorised signature, the existence of the exclusion/limitation of liability clauses in the defendant's terms and conditions governing the plaintiff's account, would exclude the defendant's liability for breaching its fundamental obligation of debiting the account only when a mandate was validly given. The clauses did not have the effect, singly or collectively, of excluding or limiting liability to the extent contended by the defendants. *Chairman, Sarawak Housing Developers Association v. Malayan Banking Bhd* (refd). (paras 85-88)

(11) The defendant ought not to be allowed to rely on the conclusive evidence clause as the bank was negligent in accepting the signature of the Accountant as an authorised signatory, as well as failing to check with either authorised personnel or an authorised signatory before paying out on the disputed cheque. The evidence also showed that the defendant did not exercise sufficient or adequate care in making or honouring the payment. (para 89)

Case(s) referred to:

Brown Westminster Bank Ltd [1964] 2 LLR 187 ***(refd)***

Chairman, Sarawak Housing Developers' Association v. Malayan Banking Bhd [2010] 10 CLJ 56 HC ***(refd)***

Globelink Container Line (M) Sdn Bhd v. Bumiputra Commerce Bank Berhad [2011] 1 LNS 414 HC ***(refd)***

Kepitigalla Rubber Estates Ltd v. National Bank of India Ltd [1909] 2 KB 1010 ***(refd)***

Malaysia Plastics Sdn Bhd v. United Overseas Bank (Malaysia) Bhd [2012] 4 CLJ 997 HC

Marfani & Co Ltd v. Midland Bank Ltd [1968] 2 All ER 573 ***(refd)***

Melewar Apex Sdn Bhd v. Malayan Banking Bhd [2007] 8 CLJ 579 HC ***(refd)***

National Australia Bank Ltd v. Hokit Pty Ltd [1996] 39 NSWLR 377 ***(refd)***

National Bank of New Zealand Ltd v. Walpole and Patterson Ltd [1975] 2 NZLR 7 ***(refd)***

Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd [1986] 1 AC 80 ***(foll)***

Tina Motors Pty Ltd v. Australia & New Zealand Banking Group Ltd [1977] VR 205 ***(refd)***

United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd [1993] 2 CLJ 31 SC ***(foll)***

Legislation referred to:
Bills of Exchange Act 1949, ss. 24, 73A
Evidence Act 1950, s. 114(g)

Other source(s) referred to:
Poh Chu Chai, *Banking Law*, 2nd edn, p. 721

For the plaintiff - Adam Abdullah (Fareez Zahir with him); M/s Adam Abdullah & Mani
For the defendant - Anita Sockalingam (M Rubini with her); M/s Zain & Co

Reported by Andrew Christopher Simon

JUDGMENT

Nallini Pathmanathan J:

Brief Background Facts

[1] The plaintiff, ML Breadworks Sdn Bhd ('the plaintiff'), seeks through this action to recover the sum of RM383,769.33 from the defendant, Malayan Banking Berhad ('the defendant') being monies debited from the plaintiff's account with the defendant, in respect of cheque number 063367, which the plaintiff maintains is a forged cheque, which the defendant erroneously honoured.

[2] The brief background facts leading up to the present claim has been comprehensively set out in the plaintiff and defendant's summary of facts which I adopt here. In or around 29 May 2004, the plaintiff opened a current account with the defendant's branch located at Lot No. G(e)-006, Ground Floor, Mid-Valley, Phase 1, 59000 Kuala Lumpur. The plaintiff was accorded the Current Account Number 51448631279 ('the current account'). The current account is subject to numerous terms and conditions. At the outset these terms formed a part of the account opening form signed by the plaintiff. Subsequently in July 2007 the current account was subject to the defendant's Terms and Conditions Governing Banking Accounts. The defendant further contends that the plaintiff is bound by the conditions printed on the cover of the cheque books issued by it to the plaintiff.

[3] By way of the plaintiff's directors' resolution dated 8 March 2010 which was received by the defendant on or about 19 March 2010, the plaintiff informed the defendant that there would be two groups of authorised signatories in respect of the operation of the current account, namely:

(a) Group A – Quek Seng Hwa and Toh Kiam Hwee;

(b) Group B – Goh Tong Pak and Lee Khia Yee.

[4] The resolution also provided for the following signing conditions:

(a) That all cheques for an amount of up to RM50,0000 were to be jointly signed by one of the signatories from Group A together with one from Group B or to be jointly signed by both signatories in Group A or to be jointly signed by both the signatories in Group B; and

(b) That all cheques for an amount above RM50,000 were to be jointly signed by both the signatories in Group B.

[5] Prior to this *vide* letter dated 22 August 2007, the plaintiff informed the defendant that the defendant was to contact one Ms. Jo-Ann Yeoh Cheng Im or one Ms. Lew Soo Fung (Sim) for any bank matters or queries.

[6] On 8 January 2010 the plaintiff notified the defendant of its new office address and telephone numbers.

[7] One Lim Li Khim was employed by the plaintiff as the company accountant for Malaysia on 29 July 2009. He continued in that position until 2 November 2010 after which he did not turn up for work. His employment was subsequently terminated. During his tenure as company accountant, a cheque was issued purportedly by the plaintiff to one Kashifa Trading *vide* Malayan Banking cheque Number 063367 dated 13 August 2010 for the sum of RM383,769.33 ('the cheque').

[8] The defendant accepted and duly debited the plaintiff's current account upon presentation of the cheque. Prior to the current account being debited, an officer from the Mid Valley branch, one Puan Siti Aisah binti Abdul Ghani, called the plaintiff's office on 30 August 2010 to verify if the cheque was good for payment and was informed by the aforesaid Mr. Lim, the company accountant that the cheque was good for payment.

[9] The cheque was cleared for payment by the defendant's Kuala Lumpur Cheque Processing Centre (KLCPC) *via* the centralised 'Sistem Penjelasan Informasi Cek Kebangsaan Secara Elektronik' (e-SPICK system). The said cheque was approved for payment in accordance with all the defendant's internal procedures.

[10] The plaintiff had received monthly statements of account in respect of the current account for the months of August to October 2010 but failed or neglected to note the aforesaid transaction which it maintained was unauthorised.

[11] In an unrelated transaction on 2 November 2010 the plaintiff, through one Ms. Lai Pooi Yee received a call from one Mr. Azwan, a bank officer from RHB Bank informing her that the company's bank account with RHB Bank did not contain sufficient funds to clear a cheque in the sum of RM554,552.10. The plaintiff discovered that this latter cheque issued from the plaintiff's RHB bank account was forged. A police report was duly lodged on the same day.

[12] An internal investigation was immediately commenced whereupon it came to light, in so far as the plaintiff is concerned, that various other cheques were also found to have been forged. These cheques were found to have been made payable to various entities with no working relationship with the plaintiff.

[13] By way of a letter dated 4 November 2010 the plaintiff informed the defendant that all cheques presented for payment were to be confirmed by one Francis Ong until further notice. By letter dated 16 November 2010 the plaintiff instructed the defendant to call the authorised signatories to verify any payments in excess of RM100,000 or when in doubt and provided the Singapore contact numbers of the authorised signatories.

[14] The current suit pertains to one of these cheques, namely the Malayan Banking Berhad cheque No. 063367 in the sum of RM383,769.33 made out to one Kashifa Trading. A police report was lodged on 9 November 2010 detailing the various cheques which had been forged including the cheque.

[15] As the defendant had debited the plaintiff's current account upon presentation of the cheque, the plaintiff requested for the original Malayan Banking Berhad cheque to be forwarded to the

A Royal Malaysian Police for investigation. However this was not done. In these circumstances the plaintiff maintains that the defendant was negligent in honouring the cheque and makes claim for the wrongful or erroneous debit of RM383,769.33 as stated above. In this suit, the plaintiff seeks a declaration that the
B defendant had wrongfully debited the current account in the aforesaid sum of RM383,769.33. It premises its claim in negligence and breach of contract.

[16] The defendant maintains that it is not liable for the losses
C claimed by the plaintiff, maintaining that:

(i) There is no forgery and that the cheques are valid and were issued by the plaintiff through its specified authorised signatories on the cheque;

D (ii) The plaintiff is estopped or precluded from setting up a claim for forgery premised on s. 24 of the Bills of Exchange Act 1949;

(iii) The defendant is entitled to invoke the statutory defence
E afforded to it under s. 73A of the Bills of Exchange Act in that the plaintiff knowingly or negligently contributed to the forgery or the making of the unauthorised signatures;

(iv) The defendant is entitled to rely on the exclusion or limitation
F of liability clauses forming a part of the terms and conditions governing the operation of the current account.

Issues

[17] Following from the competing contentions of the parties, the
G issues that arise for consideration are as follows:

(i) Whether the Malayan Banking cheque No. 063367 for the sum of RM383,769.33 made payable to Kashifa Trading ('the disputed cheque') is forged?

H (ii) If the disputed cheque is indeed forged, what is the position in law with regards to forged cheques?

(iii) Whether the plaintiff is precluded from setting up the forgery by virtue of s. 24 of the Bills of Exchange Act 1949?

I (iv) Whether the defendant is entitled to the statutory defence available to it under s. 73A of the Bills of Exchange Act 1949?

(v) Whether the defendant is entitled to rely upon the exclusion/limitation of liability clauses in the defendant's account opening form and its terms and conditions governing defendant accounts.

The Trial

[18] The trial of this matter proceeded over four days. The plaintiff called three witnesses, namely Goh Tong Pak, PW1 ('Goh') who was one of the signatories of the cheque, one Janice Teo, PW2, who is an employee of the plaintiff ('PW2') and a handwriting expert, Pang Chan Kok, William, PW3 (the plaintiff's expert').

[19] The defendant called five witnesses, namely Harcharan Singh s/o Tara Singh, DW1 (the defendant's handwriting expert), as well as four witnesses from the defendant bank, namely Mohamad Tajudin bin Mohd Ali ('DW2'), Haris bin Ramli ('DW3'), Chang Hon Huen ('DW4') and Siti Aisah binti Abdul Ghani ('DW5').

Issue (I): Whether The Malayan Banking Cheque 063367 For The Sum Of RM383,769.33 ('The Disputed Cheque') Made Payable To Kashifa Trading Forged?

[20] This issue is a question of fact to be determined by the court based on the evidence adduced at trial. The burden here is on the plaintiff to prove that the signatures on the disputed cheque was forged or unauthorised. The standard is that of a balance of probabilities. In summary therefore the burden of proof of the forgery lies on the customer, ie, the plaintiff, alleging the forgery, on a balance of probabilities.

[21] The defendant on the other hand asserts that the signatures on the cheque were not forged and were in fact the signatures of the two authorised signatories, PW1 (Goh Tong Pak) and Lee Khia Yee. The latter did not testify.

[22] The most pertinent witness in relation to this issue was PW1, an authorised signatory and a senior employee of the plaintiff. The plaintiff is a subsidiary of a group of companies known as the BreadTalk Group. The controlling entity incorporated in Singapore is a public listed company. It has diverse interests in as many as sixteen countries. PW1 was

formerly the CEO and is now the President, Chairman's Office, Special Projects. He joined the BreadTalk group in 2009. The other signatory, Lee Khia Yee joined prior to PW1 and was the former Chief Financial Officer.

[23] The cheque was made out to a third party called 'Kashifa Trading'. PW1 and PW2 both testified that the plaintiff had no business dealings whatsoever with such an entity. The accountant who is accused of forgery, took a leave of absence very soon after the cheques were forged.

[24] In the context of this factual background, PW1 testified that the signature on the cheque was not his. He was clear and unequivocal in so stating. It was put to him that the signature on the cheque was indeed his, which he denied. However there was no factual premise or basis on which it was suggested that the signature was indeed his. An examination of the ramifications of such a suggestion make it clear, in my view, that there was simply no basis to level the suggestion that PW1 had in fact signed or authorised the cheque but now chose to deny the same. The defendant's suggestion in effect is that the President, Chairman's Office, Special Projects and the former Chief Financial Officer of the plaintiff both signed a cheque to a third party and having so authorised such a payment now deny having done so and choose to bring what in effect amounts to a false action in court against the bank. By false action I allude to a false allegation of forgery, knowing full well that they had in fact authorised the issuance of such a cheque. There was simply no evidence whatsoever to support such a course of action on the part of PW1 and the plaintiff. Neither was any such contention put to PW1. Given the entirety of the circumstances, including the fact that a cheque issued from another banking account was also suspected of being forged, it appears to this court to be far more likely or probable, as contended by the plaintiff that the accountant had forged or made the unauthorised signatures and arranged for an issuance of a cheque in the name of the third party for his own devious benefit. At the risk of repetition there was simply no factual matrix to warrant a finding that PW1 and Lee Khia Yeng, as authorised signatories had signed the cheque and then brought this action against the defendant fraudulently. The fact that PW1 said nothing more than the fact that he had not signed the cheque is entirely sufficient. What more is to be said if the signature is not in fact, his?

[25] Primarily then for this reason, I concluded that the signature on the cheque was indeed forged or unauthorised. A

[26] In any event the evidence led by the parties did not end there. As is the case with matters pertaining to forged cheques, both the plaintiff and the defendant called handwriting experts to B support their respective cases. The plaintiff called one William Pang, PW3 who opined that there was very strong support for the conclusion that the signatures on the cheque were not the genuine signatures of PW1 and Lee Khia Yee. The defendant on the other hand called Mr. Harcharan Singh, DW1 who opined C that the signatures were in fact the genuine signatures of the two authorised signatories. The unenviable task of having to examine and decide between the evidence and reports of the two experts now falls to be considered. In doing so I am reminded by this passage from Sarkar on evidence on the need for caution when D considering such opinions:

> ... Expert opinion must always be received with great caution, but perhaps none so with more caution than the opinions of handwriting experts. These gentlemen stand in an impregnable fortress of their own and invariably give emphatic opinions. They E talk in terms of pseudo-science and try to create an impression by talking glibly of pen-pressure, pen-hold, pen-scope, pen-pause, retouching, joining, change of pivot, under-stroke, cross-bar, loops of many kinds, embellishments, terminals and numerous other things not easily intelligible to laymen. Almost all of them have a F favourite theory of their own which they tend to apply with a firm conviction. They are a type of remunerated witness and like others of that class have an unconscious bias in favour of the party engaging them. Moreover, their opinions are previously ascertained and they are brought only when they are favourable to the party calling. The fact that they know beforehand why they G have been called and what the party calling wishes to be proved, detracts to a great extent from the weight to be given to their opinion. Some handwriting experts do not even hesitate to claim infallibility ...
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> These experts generally have in memory a catalogue of cases in H which their opinions, confirmed by other evidence were found acceptable by court and they recite them in commendation of their superior skill, but more by way of advertisement. They do not of course give the instances in which their opinions were rejected. Weight to be attached to the opinion of the expert depends on its I

A reasonableness and scientific quality and not on length of practice of expert. (*Ram Prasad v. Shyam Lala* A 1984 (NOC) 77 (All)). It is well settled that handwriting expert's opinion must always be received with great caution and that it is unsafe to base a judgment purely on expert opinion without substantial
B corroboration (*Magan v. S*, A 1977 SC 1091;...) This rule has been universally acted upon and it has almost become a rule of law. In *Gurney v. Langlands* 1822 B & Ald 330,332 Abbott CJ said: "I think it much too loose to be the foundation of judicial evidence, either by judges or juries". The unsupported evidence of experts in handwriting will not availagainst the denial on oath
C of the alleged writer himself (*Paquin v. Turcotte* QR 35 SC 266; *Ethier v. Labelle*, QR 33 SC 39; *Deschens v. Langlois* QR 15 KB 388; Canadian cases cited in *Best on Ev* 11th Ed 240). It is dangerous to place implicit reliance on the evidence of handwriting experts ...

D **[27]** The evidence of handwriting experts is ultimately opinion evidence and to that end has to be treated with caution. It is only one piece of evidence which has to be construed within the context of the factual matrix of any particular case in determining its efficacy. It cannot take the place of substantive evidence.
E It therefore needs to be considered whether such opinion evidence, *albeit* expert, is corroborated either by direct evidence or circumstantial evidence. In the instant case the direct evidence available in relation to the cheque inclines towards it being a forgery or unauthorised. This is because of PW1's clear and
F unambiguous denial, the surrounding circumstances as explained above which make it untenable for both PW1 and Lee Khia Yee to have conspired to have placed signatures on the cheque and then disavowed or denied the same. There was no benefit that could accrue to them. They are both senior employees in the
G BreadTalk group, a large group of companies with branches in many jurisdictions. There is not an iota of evidence to suggest or corroborate any such behaviour on their part. There has been no nexus shown between Kashifa Trading, the payee or beneficiary of the cheque and these individuals. It is for this cumulative reason
H that I conclude that the direct and circumstantial evidence, such as it is, inclines towards a forged cheque or unauthorised cheque.

[28] Turning to the individual reports of PW3 and DW1, suffice to say that I have read the same, as well as the detailed and
I comprehensive submissions of learned counsel for the plaintiff and the defendant, which undertakes a meticulous examination of the

minutiae of these two reports. They are best read as a whole and I do not intend to reproduce or summarise these reports here. In essence however, PW3 concluded in his analysis of the signatures that there was very strong support that the writers, Lee Khia Yee and Goh Tong Pak were not the authors of the signatures on the disputed cheque, P1. He arrived at this conclusion by undertaking an analysis of their signatures on the disputed cheque P1 against other genuine specimen signatures of these two individuals. DW1, the defendant's expert witness, testified to the contrary, namely that the signatures on the disputed cheque, P1 were indeed authored by the two authorised signatories. He contended that such differences as appeared were within the range of natural variation and were not forgeries.

[29] Prior to hearing from the experts the court ascertained whether they could possibly concur and produce a joint report which would outline the areas on which they agreed and those on which they disagreed. The experts agreed to try and do so. On the following date they confirmed through their counsel that there were virtually no areas of consensus between them. In other words, their expert opinions were diametrically opposed.

[30] In summary they stated *vide* their joint report that:

(i) The experts found the equipment utilised by the other expert to be inadequate;

(ii) The defendant's expert maintained that the plaintiff's expert merely 'spotted' the differences between the questioned signature and the samples provided, and failed to consider the similarities. The plaintiff's expert however maintained that the only similarity was that the signatures were pictorially similar, ie, the general appearance was similar.

(iii) Both experts looked at the questioned signatures and specimen cards. The defendant's expert compared the disputed cheque with various other original cheques signed by the signatories. The plaintiff's expert compared the disputed cheque with other original contemporaneous signatures in its custody.

(iv) The defendant's expert maintained that the differences highlighted by the plaintiff's expert are not fundamental differences but fell within the range of 'natural variation' of the authors.

[31] The plaintiff's expert, PW3 in analysing the impugned signature of Lee Khia Yee on the disputed cheque and comparing it with his original specimen signatures concluded that the signature on the disputed cheque was forged because of the:

(i) hesitation and tremor in the strokes;

(ii) loops and curves not being properly executed as compared to the specimens;

(iii) the lower portion of the letter 'y' being bloated in the impugned signature as compared to the specimen signatures;

(iv) the underlining stroke stopping before the end of the signature as opposed to the specimens;

(v) the slant of the letter 'e' being vertical as opposed to the specimens where it inclines to the left.

[32] With regards to PW1's signature, PW3 explained that he concluded that the signature on the disputed cheque was forged when compared to the specimen signatures because:

(i) There was hesitation and tremor in the strokes;

(ii) The loops and curves were not smoothly executed;

(iii) Long protruding strokes to the right of the letter 'g' in the impugned signature was not present in the specimens;

(iv) Long horizontal strokes spanning the signature were not present in the specimens.

[33] In summary PW3 conceded that there were pictorial similarities between the impugned signature and the specimens. However he maintained that the differences he had pointed out above were fundamental and significant in nature and outweighed the pictorial similarity.

[34] The defendant's expert, DW1 summarised his findings as follows:

(i) He conducted an inter and intra examination of the signatures found on the disputed cheque and the specimens to determine if these signatures had the same allographs. Different allographs are not comparable. He concluded that they all had the same allographs and were therefore comparable;

(ii) He found that all the signatures on the specimens were written with a smooth line fluency with no evidence of any tremor or hesitation. He found considerable natural variation amongst the specimens, especially with regards to Lee Khia Yee's signature;

(iii) He found upon a microscopic examination of the structure of the signatures on the specimens that there was no significant hesitation or tremor. He stated that a fluently executed signature with a dash and flourish finish were bound to have natural variations. He detected a wide variation in all the signatures on the specimens. The sizes of these signatures also varied slightly. This he maintained was not due to any differences in the writing of these signatures but was a result of the dynamics and behavioural nature of the writing.

(iv) Upon comparing Lee Khia Yee's signature on the specimens and the disputed cheque, he concluded that the signature of Lee Khia Yee on the disputed cheque was written all in one stroke movement without any pen lift, just like the specimens. The pictorial impression, slope and slant were all similar to the specimens. The line fluency was good as per the specimens and there was no hesitation or tremor in line quality. He also concluded that Lee Khia Yee's signature was complex given the large number of turning points, line crossings yet was written in one line movement. Complex signatures he concluded were not easily forged. On this basis he concluded that Lee Khia Yee's signature on the disputed cheque was not forged but enjoyed the same authorship as the specimens;

(v) With regards to PW1's signature on the disputed cheque, DW1 found that the formation of this signature was written all in one stroke movement with a pen lift or 'skipping' at the lower end of the first cursive 'g' character not unlike the signature on the standard labelled as 'SG'. Although the other signatures of Goh Tong Pak on the specimens had a continuous line movement at this point, this did not mean that the signature on the disputed cheque was dissimilar as a motor impulse movement is continuous in a 'skipping' action. The other features he concluded such as the pictorial impression, slope and slant, fluency, absence of hesitation and tremor in the line structure of the signature were all similar

A both the disputed cheque and the specimens. He further concluded that the signatures were complex signatures due to a large number of turning points, line crossings and a signature written in one line movement. His opinion therefore was that there was most probably common authorship between the
B signature of PW1 on the disputed cheque and the standards.

(vi) He concluded that the differences between the signatures on the cheque and the specimens, particularly that of PW1 were not material differences. He explained that the presence or
C absence of embellishments and their random placing at the end of the signatures cannot be considered a 'difference'. For a difference to be considered as a determining factor it had to be consistent, significant and a fundamental part of the signature. He stressed that unlike PW3's analysis it was not a
D case of 'spot the difference' but a holistic examination of all the characteristics in order to determine authorship.

[35] The foregoing then comprise a brief summary of the findings of the respective experts. They were both challenged at length in
E the course of cross-examination as a perusal of the notes of proceedings will show. Counsel for the plaintiff and the defendant cross-examined their respective counterpart's experts on issues pertaining to the inadequacy of equipment utilised, methodology adopted, the utilisation of magnified images by PW3 which the
F defendant maintained had to be considered with care and the range of natural variation. The similarities and differences in the signatures on the disputed cheque as compared to the specimens was put to each of the experts. PW3 found that despite the pictorial similarity that there were on close examination
G fundamental differences that warranted the strong conclusion that the signatures on the disputed cheque were not of common authorship as the specimens. DW1 found that having adopted the holistic approach of evaluating both the similarities and the differences between the impugned signature and the specimens
H there was no significant or fundamental difference. Instead such differences as appeared fell within the range of natural variation thereby suggesting that the signatures on the disputed cheque were of common authorship as the specimens.

I

[36] As stated above, I have perused and considered the evidence of the two experts, their reports, their evidence during the course of trial as well as the submissions of learned counsel for the plaintiff. Having done so I conclude that the opinion of PW3 is to be preferred over that of DW1 because:

(i) Having undertaken a comparison of the signatures on the disputed cheque and the specimens of both Lee Khia Yee and Goh Tong Pak, it appears to this court that there are clear fundamental differences between the two, as summarised by PW3. In other words notwithstanding a seeming pictorial similarity, on close examination there are fundamental differences in the signatures;

(ii) DW1 utilised specimens from a suspect cheque which he understood to be a genuine signature. As such in arriving at the range of natural variation he took into account a 'forged' cheque which did not contain the genuine signatures of the two authors. As such his basis for ascertaining the range of natural variation was inherently flawed by the inclusion of signatures which did not belong to the writers. This had the effect of extending erroneously the range of natural variation. This could well have contributed to an erroneous conclusion;

(iii) DW1 sought to explain the clear differences between the signatures on the disputed cheque and the specimens by attributing these differences to matters such as an uneven surface on which the disputed cheque was written during signing, or fatigue. There was no factual matrix to warrant such an inference or to explain what appeared to this court to be quite obvious and fundamental differences;

(iv) As stated at the outset of this section, the primary basis for the conclusion of this court is the factual matrix of this case which does not incline towards the perpetration of a forgery by Goh Pak Tong and Lee Khia Yee. I reiterate my statements above pertaining to the unlikelihood or high improbability of Goh Pak Tong and Lee Khia Yee, as senior employees, signing the disputed cheque when they did not stand to gain any benefit from such an act. In addition to now bring an action against the defendant for recovery of the monies by the plaintiff does not appear to be remotely probable in the absence of any evidential material to support such a case.

[37] For these reasons, I conclude that that the signatures on the disputed cheque were forged or unauthorised. The plaintiff has therefore succeeded in establishing on a balance of probability that the signatures on the disputed cheque were forged or unauthorised.

Issue (II): If The Disputed Cheque Is Indeed Forged, What Is The Position In Law With Regards To Forged Cheques?

[38] It is necessary to consider the general position in law regarding the forgery of cheques. I have considered this issue extensively in the cases of *Malaysia Plastics Sdn Bhd v. United Overseas Bank (Malaysia) Bhd* [2012] 4 CLJ 997 and *Malaysia Plastics Sdn Bhd v. Malayan Banking Bhd* (CS Nos D-22-NCC-1467 & 1579-2010) and adopt below that part of the judgment in those suits in relation to the summarisation on the law regarding the forgery of cheques.

The Law

[39] The general position in law regarding to forgery of cheques has been comprehensively set out by learned counsel for the plaintiff, Mr. Gregory Ling and I adopt his submissions here. He relies on an excerpt from a well-recognised author on banking law namely Poh Chu Chai, *Banking Law* (2nd edn) at p. 721:

> When a bank makes payment on a customer's cheque, it does so on the customer's mandate. The mandate is signified by the customer's signature on the cheque. When a customer's signature on a cheque is forged, the instrument is inoperative and a bank has no authority to make payment based on the forged signature. A customer has a *prima facie* claim against a bank if the bank makes payment on a forged instrument.

[40] Following from this therefore it is incumbent upon a bank to compensate or reimburse its customer if it makes payment on a forged instrument. What then, if any, duties are owed by the customer to the bank? In other words is there any duty of care owed by the customer to his bank in the operation of a current account? This issue is comprehensively discussed in the leading decision of the Privy Council in *Tai Hing Cotton Mild Ltd v. Liu Chong Hing Bank Ltd* [1986] 1 AC 80 which was adopted by the Malaysian Courts in *United Asian Bank Bhd v. Tai Soon Heng*

Construction Sdn Bhd [1993] 2 CLJ 31. In the Privy Council decision, Lord Scarman considered the common law position. His Lordship framed the question thus:

> ... the question is whether English law recognizes today any duty of care owed by the customer to his bank in the operation of a current account beyond, first a duty to refrain from drawing a cheque in such a manner as may facilitate fraud or forgery, and secondly a duty to inform the bank of any forgery of a cheque purportedly drawn on the account as soon as he, the customer, becomes aware of it. The first duty was clearly enunciated by the House of Lords in *London Joint Stock Bank Ltd v. Macmillan* [1918] AC 777, and the second was laid down, also by the House of Lords, in *Greenwood v. Martins Bank Ltd* [1933] AC 51 ...

[41] And further on in the judgment set out the test in the *Macmillan* case thus:

> ... The House held that the customer owes his bank a duty in drawing a cheque to take reasonable and ordinary precautions against forgery.
>
> The duty ... is to draw the cheques with reasonable care to prevent forgery, and if, owing to neglect of this duty, forgery takes place, the customer is liable to the bank for the loss: per Lord Finlay LC at p. 793
>
> In so formulating the duty the House excluded as a necessary incident of the banker-customer relationship any wider duty, though of course it is always open to a banker to refuse to do business save upon express terms including such a duty. Lord Finlay LC expressly excluded any such duty saying, at p. 795:
>
> > Of course the negligence must be in the transaction itself, that is, in the manner in which the cheque is drawn. It would be no defence to the banker if the forgery had been that of a clerk of a customer, that the latter had taken the clerk into his service without sufficient inquiry as to his character.
>
> And the House approved the judgment of Bray J in *Kepitigalla Rubber Estate Ltd v. National Bank of India Ltd* [1909] 2 KB 1010. In that case the judge held that, while it is the duty of a customer in issuing his mandates (ie, his cheques) to his bank to take reasonable care not to mislead the bank, there is no duty on the

A part of the customer to take precautions in the general course of carrying on his business to prevent forgeries on the part of his servants …

[42] In *Tai Hing Cotton Mild Ltd v. Liu Chong Hing Bank* (above) the Privy Council expressly rejected the banks' contention that there was a duty upon the customer to take reasonable precautions in the management of his business with the bank to prevent forged cheques being presented to it for payment. They also rejected the contention that the customer owes a duty to take such steps to check his periodic bank statements as a reasonable customer in his position would take to enable him to notify the bank of any debit items in the account which he had not authorised. In so rejecting any wider duty this is what they said:

> … The argument for the banks is, when analysed, no more than that the obligations of care placed upon banks in the management of a customer's account which the courts have recognised have become with the development of banking business so burdensome that they should be met by a reciprocal increase of responsibility imposed upon the customer: and they cite *Selangor United Rubber Estates Ltd v. Cradock (No. 3)* [1968] 1 WLR 1555 (Ungoed-Thomas J) and *Karak Rubber Co Ltd v. Burden (No. 2)* [1972] 1 WLR 602 (Brightman J) One can fully understand the comment of Cons JA that the banks must today look for protection. So be it. They can increase the severity of their terms of business, and they can use their influence, as they have in the past, to seek to persuade the legislature that they should be granted by statute further protection. But it does not follow that because they may need protection as their business expands the necessary incidents of their relationship with their customer must also change. The business of banking is the business not of the customer but of the bank. They offer a service which is to honour their customer's cheques when drawn upon an account in credit or within an agreed overdraft limit. If they pay out upon cheques which are not his, they are acting outside their mandate and cannot plead his authority in justification of their debit to his account. This is a risk of the service which it is their business to offer. The limits set to the risk in the *Macmillan* [1918] AC 777 and *Greenwood* [1933] AC 51 cases can be seen to be plainly necessary incidents of the relationship. Offered such a service, a customer must obviously take care in the way he draws his cheque, and must obviously warn his bank as soon as he knows that a forger is operating the account …

[43] Thus the Privy Council outlined the relatively narrow scope of the duty of care owed by a customer to his bank, namely to exercise care in the way in which a cheque is drawn and secondly to warn his bank as soon as he knows or discovers forgery in relation to the operation of his account. Beyond that, at common law, no further contractual duty may be implied. In rejecting any such implied duty, the Privy Council adopted the rationale of Bray J in *Kepitigalla Rubber Estates Ltd v. National Bank of India Ltd*'s case [1909] 2 KB 1010:

> ... It amounts to a contention on the part of the bank that its customers impliedly agreed to take precautions in the general course of carrying on their business to prevent forgeries on the part of their servants. Upon what is that based? It cannot be said to be necessary to make the contract effective. It cannot be said to have really been in the mind of the customer, or, indeed, of the bank, when the relationship of banker and customer was created. What is to be the standard of the extent or number of the precautions to be taken? Applying it to his case can it be said to have been in the minds of the directors of the company that they were promising to have the pass-book and the cash-book examined at every board meeting, and to have a sufficient number of board meetings to prevent forgeries, or that the secretary should be supervised or watched by the chairman? If the bank desire that their customers should make these promises they must expressly stipulate that they shall. I am inclined to think that a banker who required such a stipulation would soon lose a number of his customers. The truth is that the number of cases where bankers sustain losses of this kind are infinitesimal in comparison with the large business they do, and the profits of banking are sufficient to compensate them for this very small risk. To the individual customer the loss would often be very serious; to the banker it is negligible.

[44] The Privy Council went on to conclude that there was no advantage in searching for a liability in tort where the parties were in a contractual relationship, more particularly a commercial one. They did not accept that the parties' mutual obligations in tort could be any greater than those to be found expressly or by necessary implication in their contract. Given that the existence of duties no wider than that set out in the *Macmillan* and *Greenwood* cases can be implied into the banking contract in the absence of express terms to that effect, the banks were held not to be able to rely on the law of tort to provide them with any greater protection than that they had contracted for.

[45] As for express contractual terms, the Privy Council held that if the banks wish to impose upon their customers an express obligation to examine their monthly statements and to make them unchallengeable after the expiry of a time limit, these express obligations would have to be brought home to the customer. They would also have to be clear and unambiguous if intended to be binding upon the customer.

[46] Finally it was also held unless the conduct of the customer could be construed as amounting to an implied representation, it could not constitute an estoppel precluding the customer from making claim from the bank. It was held that the essence of estoppel is a representation, express or implied, intended to induce the person to whom it is made to adopt a course of conduct which results in detriment or loss. In this context it was held that mere silence or inaction was insufficient to amount to a representation unless there was a duty to disclose or act.

[47] It is clear therefore that *prima facie* upon proof of a cheque having been forged, the liability of the bank arises without question as an absolute liability, unless the customer's relatively narrow duties of failing to exercise due care in the drawing of a cheque or failing to alert the bank of known forgery were to be proved, in which event the bank might avoid liability. Put another way, if an express or implied representation were made by the customer to the effect that the cheque ought to be honoured then this might amount to an estoppel availing the bank of a defence and precluding the customer from recovering the quantum paid out erroneously by the bank. In this context, mere silence or an omission to act cannot amount to such an estoppel. Such then is the position at common law.

[48] The Privy Council's decision in *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd* [1986] 1 AC 80 was adopted and followed by the Supreme Court in *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31. Anuar bin Dato' Zainal Abidin J in delivering the decision of the court traced the history of the tort of conversion which is the basis for the liability of a bank in making payment on forged instruments of its customer:

> … It is an established principle that the liability of a bank for making payment on forged instruments of its customer is founded on the tort of conversion. That is a tort of strict liability. At common law, the business of a banker was so perilous because of the nature of the tort of conversion that in 1882 it became necessary in England to introduce legislation to safeguard the banking community. The Bills of Exchange Act 1882 of UK finds its parallel in the enactment of the same name in this country passed in 1949 …

[49] Referring to the judgment of Diplock LJ in *Marfani & Co Ltd v. Midland Bank Ltd* [1968] 2 All ER 573, the Supreme Court adopted the same:

> …A banker's business, of its very nature, exposes him daily to this peril. His contract with his customer requires him to accept possession of cheques delivered to him by his customer, to present them for payment to the banks on which the cheques are drawn, to receive payment of them and to credit the amount thereof to his own customer's account, either on receipt of the cheques themselves from the customer, or on receipt of actual payment of the cheques from the banks on which they are drawn. If the customer is not entitled to the cheque which he delivers to his banker for collection, the banker however innocent and careful he might have been would at common law be liable to the true owner of the cheque for the amount of which he receives payment, either as damages for conversion or under the cognate cause of action, based historically on assumpsit, for money had and received.
>
> So strict a liability, so absolute a duty, on bankers would have discouraged the development of banking business. It was accordingly progressively mitigated by statute, first by section 82 of the Bills of Exchange Act 1882, then by the Bills of Exchange (Crossed Cheques) Act 1906, and finally by s. 4 of the Cheques Act 1967.
>
> Therefore, at common law a banker who pays out on a forged instrument drawn on his customer's account is absolutely liable to make good the loss. It is no answer for him to say that he was unaware of the forgery or that he took reasonable care. The forged instrument is a nullity and a banker has no authority, actual or implied, from his customer to act upon it. The common law has been codified in s. 24 of the Bills of Exchange Act 1949, which creates a limited exception favour of a banker …

[50] Having set out the section, more particularly that portion which creates the estoppel, namely:

> …unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority.

the court went to explain s. 24 as follows:

> Section 24 protects a banker by recourse to the doctrine of estoppel. A customer cannot recover if he has represented to his banker that the forged signature is effective and that the instrument is accordingly good for payment …

after which the Supreme Court went on to consider cases where the banker was just so protected. (see *Brown Westminster Bank Ltd* [1964] 2 LLR 187 and *Tina Motors Pty Ltd v. Australia & New Zealand Banking Group Ltd* [1977] VR 205). It is evident from a perusal of those cases that in order to comprise an estoppel, a clear representation is required from the customer to the effect that the forged signature is effective and that the instrument is accordingly good for payment. The Supreme Court also affirmed and adopted the Privy Council's reasoning and decision in *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd* [1986] 1 AC 80. The position is the same in other commonwealth jurisdictions (see *National Bank of New Zealand Ltd v. Walpole and Patterson Ltd* [1975] 2 NZLR 7; *National Australia Bank Ltd v. Hokit Pty Ltd* [1996] 39 NSWLR 377). An estoppel in terms of a clear representation from the customer therefore comprises one exception to the common law position that a bank is liable to its customer when it pays out without the customer's mandate.

[51] The final but significant provision of law that has to be considered is s. 73A of the Bills of Exchange Act 1949. It provides as follows:

> Notwithstanding section 24, where a signature on a cheque is forged or placed thereon without the authority of the person whose signature it purports to be, and *that person whose signature it purports to be knowingly or negligently contributes to the forgery or the making of the unauthorized signature*, the signature shall operate and shall be deemed to be the signature of the person it purports to be in favour of any person who in good faith pays the cheque or takes the cheque for value. (emphasis added).

[52] What then is the effect of s. 73A? Does it have the effect of altering the common law position? A perusal of s. 73A discloses that it provides that despite the effect of s. 24 which stipulates that no effective discharge or payment can be made under a bill containing a forged or unauthorised signature save where estoppel comes into play, such a bill may yet be honoured and will in fact be deemed to be the signature of the person whose signature was forged, where that same person contributes to the forgery knowingly or negligently. The section also requires the bank to pay out on the cheque in good faith. Put another way, where the person whose signature is alleged to be forged is found to have knowingly or negligently contributed to the act of forgery, the cheque will be deemed to have been made by him and the bank will not have to make good to that person, any payment made out on that instrument. However the bank should act in good faith.

[53] What is meant by 'negligently contributes to the forgery'? Is it restricted to the narrow common law duties of exercising due care in the drawing of the cheque and advising the bank immediately upon being appraised of any forgery, or does it extend further? It appears to this court that the words 'negligent contribution' to the act of forgery must necessarily extend beyond those two narrow duties. The common law position envisages that a customer is precluded from recovering from the bank monies paid out without a mandate, where the customer has been negligent in the actual transaction, ie, the drawing of the cheque or has failed to alert the bank of a forgery/fraud after discovering the same. However s. 73A speaks specifically of a 'negligent contribution to forgery' which envisages that someone other than the customer has effected a forgery, and the customer has negligently contributed to that act of forgery. The customer cannot be both the forger and also have negligently contributed to the forgery. The clear construction to be accorded to the words 'negligently contributed to the forgery' requires the customer to have in some manner contributed to the facilitation of the forgery. This is entirely different and separate from the common law duties outlined in *Tai Hing Cotton Mill Ltd* (*supra*). The section creates by statute two specific instances in which the customer is precluded from claiming from the bank for paying out without a mandate. As such s. 73A extends beyond the narrow confines of the first duty of care outlined in *Tai Hing Cotton Mills Ltd v. Liu Chong Hing Bank Ltd.*

[54] It therefore follows that s. 73A does indeed statutorily alter or amend the position in common law to the extent that it provides a complete defence to any claim for monies from the paying institution or bank under a forged instrument where that same customer knowing that the instrument was forged, contributed to it, or negligently allowed the forgery to be perpetrated. Where prior to this amendment (which came into effect on 1 July 1998) the liability of the bank under common law and s. 24 was absolute, save and unless estoppel under s. 24 could be established, s. 73A provides a clear and complete defence if the bank can prove that the customer was complicit or negligent in facilitating the forgery. Earlier under the *Macmillan* and *Greenwood* tests, the duty of the customer, it will be recalled, was confined narrowly to firstly, a duty to exercise care in drawing a cheque and secondly to inform the bank upon discovery of the forgery. With the advent of s. 73A it is evident that a new and complete statutory defence was made available to banks. However the burden remains on the bank to prove such complicity or negligence. (see also *Globelink Container Line (M) Sdn Bhd v. Bumiputra Commerce Bank Berhad* [2011] 1 LNS 414; and *Melewar Apex Sdn Bhd v. Malayan Banking Bhd* [2007] 8 CLJ 579).

[55] Section 73A therefore provides a statutory defence to banks which alleviates in two limited circumstances the bankers' wide common law liability as enunciated in *Tai Hing Cotton Mill Ltd* (*supra*) and *UAB v. Tai Soon Hing* (*supra*). Prior to this amendment, the banks could find no relief against such strict liability unless they were in a position to clearly establish an estoppel on the part of the customer. Such estoppel required a clear representation from the customer that the impugned instrument was good for payment. In such an instance, given the clear representation from the customer, the customer was precluded from seeking to renege on his representation and seeking discharge from the bank for the payment out on the forged instrument.

[56] As matters stand therefore, the common law establishes the strict liability of a bank to make good any payment out on a forged instrument on the basis that there was never any mandate from the customer to warrant good discharge of the same. Section 24 made the first inroad into this broad strict liability position by

allowing the bank to disclaim liability where it could establish an estoppel on the part of the customer, which amounted to a representation that the forged instrument was good for payment. Section 73A then provided two further specific instances in which the banks could also seek refuge, as set out above. The statutory effect of the latter part of the first limb of s. 24 and s. 73A is to carve out specific instances when the liability of the bank on a forged instrument is not absolute.

Issue (II): Whether The Plaintiff Is Precluded From Setting Up The Forgery By Virtue Of s. 24 Of The Bills Of Exchange Act 1949?

[57] I have concluded above that the said cheque was forged. The consequences of that conclusion are that the defendant is liable to the plaintiff for having erroneously honoured the disputed cheque unless the second limb of s. 24 of the Act or s. 73A of the Act affords a defence to the defendant. Section 24 of the Bills of Exchange Act 1949 therefore now comes into play. It provides as follows:

> 24. Forged or unauthorized signature
>
> Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority;
>
> Provided that nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery.

[58] In essence it provides that no discharge ought to be afforded in respect of a forged or unauthorised bill unless an estoppel can be raised against the party whose signature was so forged. In the context of the present case, the issue that arises for consideration is whether an estoppel arises against the plaintiff to preclude it from making claim against the defendant for paying out or honouring the forged or unauthorised cheque.

[59] I have set out above the position in law in relation to s. 24 of the Bills of Exchange Act 1949. It protects a banker by recourse to the doctrine of estoppel. It comes into play to preclude a customer such as the plaintiff from recovering the monies paid out by mistake by the bank where the customer has represented to his banker that the forged signature is effective and that the instrument is good for payment. The cases on point which are referred to above specify that a clear representation is required from the customer to the effect that the forged signature is effective and that the instrument is accordingly good for payment. An estoppel in terms of a clear representation from the customer therefore comprises one exception to the common law position that a bank is liable to its customer when it pays out without the customer's mandate.

[60] Was there evidence in the instant case of any such clear representation from the customer that the cheque was good for payment? Having perused the evidence in its entirety I am not convinced that there was any such representation from the plaintiff to the defendant. The defendant in its submissions seeks to rely on the express contractual limitations set out as part of the terms governing the conduct of the account as establishing such an estoppel. It is contended that if the customer is in breach of any express duty owed to the bank, then the customer would be estopped from asserting that the account had been incorrectly debited. Having set out the law above in relation to the second limb of s. 24, I am unable, with respect, to agree with the submission of learned counsel for the defendant. The subsistence of terms and conditions of the defendant's current account, which were signed by the signatories at the inception of the account, cannot in themselves, comprise an estoppel for the purposes of s. 24. The defendant appears to imply that the plaintiff, having contracted to the effect that it would take steps to avoid forgery, owes a duty to the defendant to actively preclude forgery, and that the failure to do so in the instant case warrants the establishment of an estoppel against the plaintiff customer. This does not appear to be the position in law as set out in *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31. The section as construed in the *UAB* case clearly requires an express act from the customer which warrants the existence or creation of an estoppel.

[61] In the instant case no representation was made by the plaintiff that the forged signature of the accountant was good and ought to be honoured. There was no evidence led by the defendant to this effect. In any event the onus under s. 24 is on the defendant to establish that such an estoppel was in fact created.

[62] With respect to the cheque in question, it is evident from a perusal of the defendant's evidence as a whole, through its five witnesses, that the forged cheque was not detected, but in fact was viewed as being valid. In accordance with the bank's system of clearance, after the cheque had passed examination through the e-SPICK system, one of the defendant's employees, DW5, actually called the plaintiff's offices for verification of the subject cheque. DW5 testified that the receptionist who answered the call put her through to the accounts division of the plaintiff where the call was answered by the accountant himself. DW5 sought to speak with the persons authorised to verify transactions, either one Ms. Jo-Ann Yeoh Cheng Im or one Ms. Lew Soo Fung (as had been advised by the plaintiff *vide* its letter of 22 August 2007). However DW5 was advised that they had left the organisation. DW5 stated that she then sought to speak to an authorised signatory but was advised they were all in Singapore. DW5 maintained that the accountant then specified that he was the accountant and was authorised to verify cheques on behalf of the plaintiff whereupon she sought the details of the cheque from him which he promptly verified. This was accepted as good and sufficient verification and the cheque duly honoured.

[63] It is apparent from the foregoing that no verification was undertaken with an authorised representative of the plaintiff or an authorised signatory by the defendant. On the other hand, the plaintiff had not written to the defendant to advise of the new authorised representative. Neither were the numbers of the authorised signatories in Singapore made available. Given this factual matrix can it be said that the accountant's fraudulent verification amounted to a representation giving rise to an estoppel under s. 24? It is clear that such verification by the accountant cannot amount to a representation from the plaintiff sufficient to create an estoppel under s. 24. In the two cases cited by the Supreme Court in the *UAB* case there were clear representations made by way of express statements between the client and the

banker which assisted in creating the estoppel. In *Brown v. Westminster Bank Ltd* [1964] 2 LLR 187, the branch manager was given the impression by the plaintiff (in that case) that the cheques in issue were in fact genuine. At a second interview the plaintiff was specifically asked by the branch manager to check her statements of account. In these circumstances the court in that case held that the customer was not entitled to recover the monies because an estoppel in favour of the bank had been created by the customer's failure to respond to the inquiries made by the bank's branch manager. Additionally the customer's silence in effect amounted to a representation that the cheques were genuine.

[64] And in *Tina Motors Pty Ltd v. Australia & New Zealand Banking Group Ltd* [1977] VR 205 on two occasions the bank doubted the signatures on cheques presented by an employee of the customer and called a director of the customer who stated that if the employee was presenting a cheque, the signature was in order. This too amounted to a clear representation which created an estoppel in the bank's favour.

[65] In the instant case, I can find no such representation to have been made by the customer, ie, the plaintiff. The fact that the accountant verified the cheque is insufficient to amount to a representation creating an estoppel. The accountant was neither the authorised verifier on behalf of the plaintiff, nor an authorised signatory, according to the defendant's own records. Unlike the *Tina Motors* case (above), none of the authorised signatories held out to the bank that this cheque was good for payment. In these circumstances I find that there was no representation made in the instant case by the plaintiff warranting the existence or creation of an estoppel as envisaged under s. 24 of the Bills of Exchange Act which precludes the plaintiff from recovering the monies erroneously or wrongfully paid out by the defendant.

Issue (III): Whether The Defendant Is Entitled To The Statutory Defence Available To It Under s. 73A Of The Bills Of Exchange Act 1949?

[66] In order to ascertain whether a defence under s. 73A is available to the defendant, it is necessary to examine and consider the financial or management control system practiced by the plaintiff as this will indicate whether it can be said that the plaintiff knowingly or negligently contributed to the forgery or unauthorised

signing of the cheque, thereby absolving the defendant of having paid out on the said cheque provided the defendant did so in good faith.

[67] It should be borne in mind that this section which affords a statutory defence to the bank, places however the onus on the defendant to establish that the plaintiff had in fact contributed to the forgery or to the making of the forged signature.

The System Of Financial Or Management Control Practiced By The Plaintiff

[68] Evidence on the issue of the financial and management control system practised by the plaintiff was tendered by PW1 and PW2. It is pertinent that the plaintiff is one of the many companies that comprise a part of the BreadTalk Group of companies that are based in some sixteen countries. The headquarters appear to be Singapore. PW1 is a director of the plaintiff and has been so since 3 February 2009. He is based in Singapore. PW2 is currently the Senior Finance Manager of BreadTalk Pte Ltd and has responsibility for the plaintiff's operations in Malaysia as well as Singapore and Thailand. She joined her employer in Singapore in 2009.

[69] Both PW1 and PW2 testified as to the plaintiff's company's procedure when making payments to third parties. It transpired from their evidence that the plaintiff's accountant, Lim Li Khim ('the accountant'), who is suspected of having issued or authored the disputed cheque, was employed on 29 June 2010. As the plaintiff's accountant he was accorded the authority and responsibility of dealing with the plaintiff's finances and accounting matters. A team of some three other employees or accounts executives worked under him. None of them works with the plaintiff any longer. Part of the accountant's duties included taking charge of and responsibility for the preparation of cheques to be signed by the authorised signatories of the plaintiff as and when payments were required to be made to various third parties. From the inception of the account the two groups of signatories as authorised and evidenced by company resolutions, changed from time to time. However, a common feature was that all signatories were resident in Singapore.

[70] The procedure for the preparation of cheques proceeded on the following lines: All cheques of the plaintiff, ie, the Malaysian operations were prepared or handled by the accounts executives in the accounts department based in Kuala Lumpur. These cheques were prepared on the instructions of the accountant. With regards to payments to third parties, both PW1 and PW2 testified that all payments to third parties required the approval of the plaintiff's headquarters in Singapore. The cheques which were prepared as aforesaid, would be sent together with the relevant supporting documents such as payment vouchers, invoices and/or purchase orders for verification by the Senior Finance Manager. These documents and the cheques would be forwarded by the accountant. At the material time the Senior Finance Manager of the BreadTalk Group was one Eric Toh. Eric Toh was based in Singapore and so the cheques were couriered to him. He was replaced by PW2 pursuant to a restructuring exercise within the group between November 2010 and January 2011. Eric Toh as the Senior Finance Manager would then verify the payments to be made and hand over the cheques to the signatories for their signature. Once the cheques were signed the Senior Finance Manager would hand the cheques back to the accountant. In other words the plaintiff had established a system of internal control to safeguard against irregular practices.

[71] It follows from the foregoing that if the disputed cheque was indeed forged, it would not have gone through this procedure. It would simply have been forged and presented to the bank for the cheque to be honoured to the third party payee.

[72] The custody of the cheque books was left with the accountant. PW2 was queried as to why the accountant was accorded custody of the books when none of the signatories was resident in Malaysia. PW2 asserted that it was necessary to keep the physical cheques with the company accountant in the respective countries where they had operations for two reasons: firstly because it was not possible for the Senior Finance Manager to have to prepare the cheques for every single payment for 300 outlets in 12 countries himself, and secondly to ensure that the executives were not able to tamper with or forge the cheques. The defendant contended that these answers established that the plaintiff's controls and management systems were inadequate.

[73] The defendant also charged that the directors of the plaintiff had not supervised Lim nor checked the company's cheque books. PW1 it was contended did not examine the company's bank statements nor reconcile the cheques paid out against the bank statements. The fact that Eric Toh undertook these duties, it was contended was also inadequate because Eric Toh was not called to establish this. As such there was no evidence that Lim was supervised. Ultimately it was contended that there were no safeguards in place to safeguard against forgery.

[74] The defendant also faulted the overall management of the plaintiff contending that the plaintiff's organisational structure was such that there was no clear overall head of the Kuala Lumpur office for both operations and finance. In essence the contention that the directors failed to supervise the operations and more particularly the financial matters pertaining to the plaintiff sufficiently or at all. PW1 it was contended knew very little about the workings of the plaintiff in that he did not know the identity of or the number of accounts executives who were involved in the preparation of cheques, or the precise nature of the accountant's duties.

[75] The defendant further charged in submissions that the independent verification process as well as the plaintiff's practice of allowing the accountant to keep custody of the cheque books as well as sending only the cheques without the cheque book showing the stubs to the signatories all amounted to inadequate safeguards against forgery. This it was contended tended to show that the plaintiff had contributed towards the forgery.

[76] The plaintiff met these charges above by pointing out first that the issue of whether it contributed to the forgery is a question of fact to be determined upon the particular facts of this case. I concur that this is indeed the case. The plaintiff further submitted that it, as a large and diverse multinational company, had to entrust someone to prepare the cheques. To that extent the plaintiff had to delegate the duties of the preparation of cheques for payment to various parties at its country offices and subsidiaries. This happened, in the instant case, to be the accountant. However the plaintiff maintains that it had in place internal controls as well to seek to avoid forgery or fraud.

[77] The steps taken to avoid forgery included the preparation of the cheque by one employee while there was another person to supervise the person preparing the cheques. Here the supervisory authority was Eric Toh. However the plaintiff pointed out that even with this system of supervision in place it was not possible to eliminate the possibility of forgery because the forger would be able to carry out the forgery and have a cheque clear within three days. Any detection beyond that time period would serve no useful purpose. In the instant case, Lim Li Khim was absent since September 2010. He had moreover, as explained by PW2 been given further time to carry out bank reconciliation. As such the possibility of detection was postponed. As such the plaintiff contends that even with supervisory controls in place, there is no guarantee that forgery can be eliminated. The plaintiff further points out that even if the Senior Finance Manager had been resident in Kuala Lumpur rather than Singapore this would not have materially altered the position whereby the accountant would remain in charge of financial matters. In other words, the forgery in question would not necessarily have been averted if Eric Toh had been resident in Kuala Lumpur.

[78] In any event the position in law does not require the customer to contemplate and preclude all instances of forgery. In *United Asian Bank v. Tai Soon Seng Construction Sdn Bhd* (above) the Supreme Court held that:

> The customer must use reasonable care in drawing the cheque so that the bank will not be misled. However, in ordinary circumstances, compliance with his duty does not require the customer to contemplate the possibility of either an authorisation or mandate being forged. He is thus under no duty to exercise reasonable care in the general course of carrying on business to prevent forgery on the part of an employee.

[79] And in *Melewar Apex Sdn Bhd v. Malayan Banking Bhd* [2007] 8 CLJ 579 in relation to s. 73A it was stated:

> … The plaintiff is a company. It acts through its agents and servants. It is expected that the Finance Manager of the company would keep the cheque books and accounts of the company. Nothing in s. 73A of the Bills of Exchange Act 1949 would cause any change in the decision in *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd & Ors* with regard to reliance upon a trusted employee to keep the cheque book and to prepare cheques if any are to be drawn from the cheque account.

[80] In like manner although the accountant here was on probation, the plaintiff cannot be faulted for relying upon him to keep custody of and supervise the preparation of cheques. The accountant here held the highest position in relation to the accounts function of the plaintiff in this jurisdiction. He had other executives under his care. He was subject to supervision by Eric Toh. Eric Toh was not resident in Malaysia. The accountant of an organisation is routinely expected to have access to and keep custody of the cheque books of an organisation.

[81] I have heard and considered the evidence as a whole, as well as read the comprehensive submissions of learned counsel for the plaintiff and the defendant. Given the entirety of the circumstances, I find that:

(i) The plaintiff as a multi-national company with a large number of branches in many countries, chose to have its finances, more particularly the operational aspects of cheque preparation carried out in the country where a particular branch or entity subsisted. It was explained that this was for ease of access to invoices, delivery notes and local conditions of trading. However the signatories were all based in Singapore which is the headquarters and where all cheques were sent for signing. A process of verification was carried out prior to obtaining the authorised signatories' signature on cheques. The plaintiff therefore had a proper and adequate system of issuing cheques to third parties which was subject to a system of verification;

(ii) There was no negligence nor contributory negligence on the part of the plaintiff in having the signatory in a different jurisdiction from where the plaintiff was situated. The fact that the cheque books were not sent so as to enable a sighting of the cheque stubs, does not, in itself amount to a contribution to forgery. The fact that there was in place a supervisory process as well as a reconciliation process that was undertaken regularly shows that steps were taken to safeguard against fraudulent practices. On the facts of this case, there was a delay in detecting the forgery partly because the accountant sought an extension of time for reconciliation, which was granted;

(iii) There was a sufficient system of supervision in place in the form of Eric Toh and subsequently PW2 to ensure that operations were being run regularly. The fact that PW1 did not have an intimate knowledge of precisely who peopled the accounts department of the plaintiff does not mean that there was no adequate supervision of the plaintiff's operations. The fact that the plaintiff is a large diverse multinational with as many as sixteen entities to run means that it will be difficult for the directors to have an intricate understanding of all details. However it was clear from PW1's evidence that he understood and could explain the system employed by the plaintiff to ensure that there was adequate supervision and management control over the issuance of cheques by way of verification prior to signing, as well as reconciliation subsequently.

(iv) The plaintiff cannot be said in all the circumstances of the case to have contributed to, or caused or facilitated the forgery that took place.

[82] It must be said that the defendant sought to have an adverse inference drawn against the plaintiff for failing to call Eric Toh. However it is clear from a reading of the entirety of PW2's evidence that Eric Toh could not be contacted for the purposes of trial. I accept the plaintiff's evidence to the effect that Eric Toh is no longer with the BreadTalk Group and is not within the jurisdiction of the court. There is nothing to indicate that the plaintiff deliberately withheld the presence of Eric Toh. Accordingly I am unable to concur that an adverse inference under s. 114(g) of the Evidence Act 1950 ought to be drawn.

[83] For these reasons it appears to this court that the defendant has not been able to establish that the plaintiff 'knowingly or negligently contributed to the forgery or making of the unauthorised signature'. There was simply insufficient evidence to establish negligence, and far less, 'knowing' assistance.

[84] As for whether the defendant acted in good faith in honouring the cheque, this does not fall for consideration in light of my conclusion above. In conclusion therefore the defendant has failed to satisfy s. 73A of the Bills of Exchange Act 1949.

Issue (IV): Whether The Defendant Is Entitled To Rely Upon The Exclusion/Limitation Of Liability Clauses In The Defendant's Account Opening Form And Its Terms And Conditions Governing Defendant Accounts.

[85] The defendant also relies on cls. 2.7, 6.1 and 6.3 contained in the terms and conditions governing the relationship between the plaintiff and the defendant.

[86] In cl. 2.7 the customer is tasked with having to take precautions in drawing cheques so as to prevent forgery. In the event a loss is occasioned by the failure of the customer to take such precautions then the customer is to keep the bank fully indemnified for loss arising from forgery or unauthorised cheques. I have made a finding in the instant case that the plaintiff did in fact have an adequate system of safeguards in place to seek to avoid forgery or unauthorised use of its cheques. Given the foregoing it follows that the loss in this case did not arise as a consequence of the plaintiff having failed to take any or adequate precautions against forgery. Accordingly this clause does not exclude or limit the liability of the defendant.

[87] Clause 6.1 is a general indemnity clause which seeks to exonerate the defendant entirely. In like manner, cl. 6.3 seeks to limit the defendant's total liability under the terms and conditions to nothing more than RM500 for all claims. In relation to the applicability of these clauses so as to exclude or limit the defendant's liability, the reasoning in *Tai Hing Ltd v. Liu Chong Hing Bank* (above) is instructive. In that case the limitation or exclusion clauses took the form of clauses to the effect that in the absence of confirmation from the client within a specified period after issuance of a bank statement, that statement would be taken as conclusive. This would mean that for forged cheques, if not detected within a specific period after issuance of the bank statement, would amount to conclusive evidence of the validity of the transaction notwithstanding that forgery had occurred. Given the existence of such clauses in the contract between the customer and the bank, the Privy Council held as follows:

> ... Their Lordships agree with the views of the trial judge and Hunter J as to the interpretation of these terms of business. They are contractual in effect but in no case do they constitute what has come to be called "conclusive evidence clauses." Their terms

> are not such as to bring home to the customer either "the intended importance of the inspection he is being expressly or impliedly invited to make," or that they are intended to have conclusive effect against him if he raises no query, or faith to raise a query in time, upon his bank statements. If banks wish to impose upon their customers an express obligation to examine their monthly statements and to make those statements, in the absence of query, unchallengeable by the customer after expiry of a time limit, the burden of the objection and of the sanction imposed must be brought home to the customer. In their Lordships' view the provisions which they have set out above do not meet this undoubtedly rigorous test. The test is rigorous because the bankers would have their terms of business so construed as to exclude the rights which the customer would enjoy if they were not excluded by express agreement. It must be borne in mind that, in their Lordships' view, the true nature of the obligations of the customer to his bank where there is not express agreement is limited to the *Macmillan* and *Greenwood* duties. Clear and unambiguous provision is needed if the banks are to introduce in the contract a binding obligation upon the customer who does not query his bank statement to accept the statement as accurately setting out the debit items in the accounts.

[88] In like manner with regards to the instant clauses referred to above, the rationale is that if it was the intention of the defendant that the plaintiff would be deprived of rights which it would enjoy if not excluded by express agreement, then the burden of the objection and of the sanction imposed ought to be brought home to the defendant. In other words can it be said that it was brought home to the plaintiff when it entered into the relationship of banker and customer that it agreed at that point expressly to take precautions in the general course of carrying on its business to prevent forgeries on the part of its employees? And that it would forgo its right to make claim against the bank for erroneously honouring forged cheques? It is not evident from a perusal of the clauses above that these issues were expressly set out and agreed to by the plaintiff - customer. Put another way, was it made clear to the plaintiff that in the event of an unauthorised debiting of the plaintiff's account arising from forgery or an unauthorised signature, the existence of cls. 2.7, 6.1 and 6.3 would have the effect of excluding the defendant bank's liability for breaching its fundamental obligation of debiting the account only when a mandate is validly given? There is no evidence before this court to suggest that that was indeed the

case. For that reason I am not convinced that the provisions in cls. 2.7, 6.1 and 6.3 *albeit* singly or collectively, can have the effect of excluding or limiting liability to the extent contended by the defendant. (see also *Chairman, Sarawak Housing Developers' Association v. Malayan Banking Bhd* [2010] 10 CLJ 56).

[89] Even if I am incorrect in so concluding, the defendant ought not to be allowed to rely on the conclusive evidence clause as the bank was negligent in accepting the signature of the accountant as an authorised signatory, as well as failing to check with either authorised personnel or an authorised signatory before paying out on the subject cheque. Even if the forged signature was difficult to ascertain upon examination, the fact that the further oral check by DW5 was done with persons who were neither the authorised personnel to verify the validity of the cheque, nor the authorised signatories, shows that the defendant did not exercise sufficient or adequate care in making or honouring the payment. This is a further reason for concluding that the defendant ought not to be allowed to rely on the exclusion or limitation clauses specified. For these reasons I conclude that these clauses do not exclude or limit the defendant's liability.

[90] In all these circumstances, judgment is entered for the plaintiff.